No. 21,839

IN THE

United States Court of Appeals

For the Ninth Circuit

DONALD E. BARKER,
Appellant,

vs.

GRACE LINE, a corporation,
Appellee.

BRIEF FOR APPELLEE

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Subject Index

Table of Authorities Cited

Rules

Statutes

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I.

JURISDICTIONAL STATEMENT

Appellant (plaintiff below) has appealed from an adverse judgment: (1) of dismissal on the pleadings as to one cause of action, and (2) entered on a defense verdict as to certain other causes of action. The action was brought in the United States District Court by a seaman against his shipowner employer for personal injuries incurred while employed aboard the vessel. Jurisdiction was claimed under the Jones Act (46 USC § 688) and under the General Maritime Law (Art. III, Constit. of U.S.). Jurisdiction on appeal is under 28 USC § 1291.

II.

STATEMENT OF THE FACTS

Appellant's statement of the facts (Appellant's Opening Brief, pages 3-4) is not wholly correct or

complete, failing to state certain undisputed facts and (where there was a conflict in the testimony) stating the version most favorable to appellant, even though this version was apparently not believed by the jury. For this reason we believe it necessary that the facts be restated herein.

Appellant was employed as a relief purser for a single voyage on the SS SANTA FLAVIA (Rep. Tr. p. 157), a vessel owned and operated by appellee (Rep. Tr. p. 121). In the evening of May 22, 1965, the vessel arrived at the port of Manzanillo, Mexico, being secured to the dock at approximately 9:30 P.M. on that date. (Rep. Tr. p. 11.) Appellant, having completed his duties as purser, went ashore on leave on his own business for the purpose of securing a haircut. (Rep. Tr. p. 14.)

The dock to which the vessel was secured was owned by the Mexican government and was not under appellee's ownership or control. (Rep. Tr. p. 122.) The dock was a modern concrete dock several hundred feet in length with a shed or warehouse running almost the length of the dock. On either side of the warehouse there was an open apron with railroad tracks, permitting vessels to be berthed on both sides of the dock. (Rep. Tr. pp. 122-123.)

It was dark at the time, but the dock area was well lighted from lights over the warehouse doors and from the vessel's cargo lights. (Rep. Tr. pp. 61-63, pp. 123-124.) Cargo operations were in progress, and in order to avoid these, appellant, having descended the gangway toward the after end of the vessel, walked across

the apron and proceeded towards shore close to the warehouse wall. (Rep. Tr. pp. 18-19, pp. 59-61.) He followed this lighted and paved route several hundred feet to the end of the warehouse building, at which point the lighted and paved way crossed over to the other side of the dock and thence via a paved and lighted way into town. (Rep. Tr. pp. 159-160; Defendant's Exh. C.) Instead of following this paved and lighted way appellant chose to proceed directly ahead into a dark area along an unpaved railroad track. (Rep. Tr. pp. 64-65, p. 130.) While proceeding into this area appellant fell into a hole some two feet deep and two feet in diameter in the rough unpaved area between the railroad rails (Rep. Tr. p. 21, pp. 129-130.) The hole was some 40 to 50 feet on land from the end of the pier (Rep. Tr. p. 140), some 65 or 70 feet from the nearest lights on the dock (Rep. Tr. p. 129), and approximately 150 feet from the bow of the vessel (Rep. Tr. p. 67). As a result of this fall appellant sustained injuries to his right leg.

The statement of facts in Appellant's Opening Brief (page 4) refers to testimony introduced by appellant that it was customary on vessels to post warnings of known hazards. This statement by appellant ignores the contrary evidence on this point, which was obviously believed by the jury which answered "no" to each of the following special interrogatories (Cl. Tr. p. 111):

"Count I:

a. Was defendant Grace Line, Inc. negligent in connection with the condition of the adjacent dock?

b. Was defendant Grace Line, Inc. negligent in failing to warn plaintiff Donald Barker of the condition of the dock?"

Captain Staus (testifying on behalf of appellee) testified that the hazard was not known to him (Rep. Tr. p. 140), and Captain Mauldin (testifying on behalf of appellee) testified that there was no custom of inspecting a port for possible dangers and posting notice thereof, the only such posted notices being those required by local government decree or because of known enemy combat action. (Rep. Tr. pp. 171-173.)

Appellant's Complaint contained five causes of action, only two of which are involved in the present appeal. These are the first cause of action which charged negligence for failure to provide appellant with a safe and proper means of access to and egress from the vessel (Cl. Tr. p. 3), and the third cause of action which charged the vessel was unseaworthy for the same alleged failure (Cl. Tr. pp. 4-5). (Of the other three causes of action contained in the Complaint, that for maintenance and cure was withdrawn by appellant, and the jury's verdict and findings on special interrogatories as to the causes of action charging negligence and unseaworthiness for failure to furnish proper medical care, etc. are not challenged by appellant on this appeal.)

As to the two causes of action which are involved in this appeal, appellee prior to trial moved for summary judgment of dismissal as to the first cause of action and for dismissal on the pleadings as to the

third cause of action. (Cl. Tr. p. 38, et seq.) Appellee's motion was denied as to the first cause of action but was granted as to the third cause of action, which was ordered dismissed. (Cl. Tr. p. 99.) Appellant was permitted by the trial Court to go to the jury on the issues raised by the first cause of action, the jury returning a defense verdict and answering the special interrogatories in the negative. (See p. 4 of this brief.) The present appeal is from the judgment of dismissal as to the third cause of action and from the judgment entered on the defense verdict as to the first cause of action.

III.

ARGUMENT

1. SUMMARY OF ARGUMENT

Appellant, in his Opening Brief, argues as to the third cause of action that a vessel may be rendered unseaworthy because of a dangerous condition on a dock ashore, and argues as to the first cause of action that the jury's verdict for appellee should be set aside for alleged errors in the Court's instructions.

Appellee in response submits with respect to the unseaworthiness question that a condition on a dock or ashore far removed from the vessel cannot render the vessel unseaworthy. Appellee further submits with respect to the negligence question that there were no errors in the trial court's instructions which would justify a reversal of the jury's defense verdict, and further submits that appellant was not entitled under

the applicable law to have these issues submitted to the jury, since appellee was entitled to summary judgment dismissing this cause of action.

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2. A DANGEROUS CONDITION ON A DOCK OR ASHORE DOES NOT RENDER A VESSEL UNSEAWORTHY

a. The Doctrine of Unseaworthiness.

The major portion of appellant's Opening Brief (pp. 9-30) is devoted to a lengthy and somewhat involved argument on the doctrine of unseaworthiness. A very substantial number of cases are cited by appellant, but no case cited holds or even suggests that a vessel may be rendered unseaworthy because of a dangerous condition on a dock or ashore in an area far removed from the vessel's activities. Appellee submits that a dangerous or unsafe condition on a dock or ashore cannot under the law be held to render a vessel unseaworthy so as to entitle a seaman to recover on that ground. While the doctrine of unseaworthiness has been markedly expanded in recent years, it still relates to the unseaworthiness *of the vessel.* The nature of the doctrine is well stated by the Supreme Court of the United States in *Alaska Steamship Co. v. Petterson,* 347 US 396, 98 L.ed. 798 (1954), as follows:

> "The doctrine of seaworthiness was stated as a settled proposition in *The Osceola,* 189 US 158, 175, 47 L.ed. 760, 23 S.Ct. 487, as follows:
>
> 'That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of

> the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.'
>
> "That doctrine was a natural outgrowth of the dependence of a ship's crew upon the seaworthiness of the ship and its equipment."

Similarly, the Supreme Court in *Mitchell v. Trawler Racer,* 362 U.S. 539, 4 L.Ed.2d 941 (1960) stated:

> "The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use."

In the recent case of *Waldron v. Moore-McCormack Lines, Inc.,* 356 Fed.2d 247, 1966 A.M.C. 1844 (C.A. 2d Cir. 1966), Judge Medina, in reviewing the historical background and development of unseaworthiness, stated:

> "But the basic three-fold concept of a sound ship, proper gear and a competent crew has remained unchanged. Each of these contributes in a special way to provide 'a vessel reasonably suited for her intended service'."

Not one of the cases cited by appellant goes beyond this basic concept and none of them would support or justify a holding that a vessel may be rendered unseaworthy because of a dangerous condition on a dock or ashore far removed from the vessel's activities.

b. Appellant's Review of the Earlier Cases on Unseaworthiness.

In counsel's survey of the earlier cases (pp. 9-17 of Appellant's Opening Brief) it is suggested that Mr.

Justice Brown in writing his opinion in *The Osceola,* 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760 (1903):

> ". . . had in mind an obligation of the shipowner considerably broader than merely supplying a stout hull and proper appliances, gear and appurtenances." (Appellant's Opening Brief, p. 11.)

The cases cited in behalf of this speculative and novel proposition furnish little support for it.

a. In *Scarff v. Metcalf,* 107 N.Y. 211, 13 N.E. 796 (Ct. of Appeals N.Y., 1887) there is no mention of unseaworthiness, liability being based upon failure to furnish proper medical care to an injured seaman.

b. *Dixon v. The Cyrus,* Fed. Case 3930, 7 Fed. Cas. 755 (D.C. Penn. 1789);
The Noddeburn, 28 F. 855 (D.C. Ore. 1886);
The Edith Godden, 23 F. 43 (D.C. S.D. N.Y. 1885);
The A. Heaton, 43 F. 592 (Cir. Ct. Mass. 1890); and
The Julia Fowler, 49 F. 277 (D.C. S.D. N.Y. 1892);
all involved failures of the vessel's rigging, ropes or gear;

c. *The Wanonah,* Fed. Case No. 17412, 29 Fed. Cas. 697 (D.C. Maine 1875) involved the vessel's age and lack of repair;

d. *The Heroe,* 21 F. 525 (D.C. Del. 1884) involved defects in the vessel's engines;

e. *Olson v. Flavel,* 34 F. 477 (D.C. Ore. 1888) involved the vessel's gangway; and

f. *The Bark Cann,* 2 F. 241 (2nd Cir. 1880); and *The Frank and Willie,* 45 F. 494 (D.C. S.D. N.Y. 1891) involved improper stowage of dunnage and lumber aboard the respective vessels.

Clearly, each of these cases involved defects *aboard the vessel* and certainly none of them go beyond a condition on the vessel. Counsel states (p. 17, Appellant's Opening Brief) that:

> "A fair appraisal of what constitutes unseaworthiness in the light of the foregoing cases and as the law existed at the time of the pronouncement of the second proposition in *The Osceola* is that unseaworthiness consists of a failure to provide a seaman with a safe place in which to work."

We submit that counsel's statement is unsupported by the cited authorities and that in fact a fair appraisal of what constitutes unseaworthiness is the existence of a defective or dangerous condition on *the vessel,* including its hull, appliances, gear and (more recently) its manning.

c. Place of Work.

Appellant's next argument (p. 17-23 of Appellant's Opening Brief) is headnoted:

> "A vessel is rendered unseaworthy by reason of dangerous conditions ashore which render the place in which the seaman works unsafe."

Not only is this statement incorrect, but it would appear to be wholly inapplicable in the present case, since appellant was injured, not in a place in which

he was working, but in an area far removed from the vessel while he was proceeding on leave ashore upon his own business. The five cases cited by appellant certainly do not sustain appellant's proposition, since four of them involved injuries caused by defects in unloading equipment during unloading processes, and the fifth case involved the impact ashore of an unseaworthy condition created aboard the vessel.

It is quite clear that in the first case cited by counsel (*DeSalvo v. Cunard Steamship Co., Ltd.,* 171 F.Supp. 813 (D.C. S.D. N.Y. 1959)) the injury was due to improper use of ship's equipment. This is perfectly apparent from the court's instructions on unseaworthiness (pp. 816-817) and from the court's statement at page 820, that:

> "In any event the passenger baggage chute must be treated as 'ship's equipment'. It was used only for the purpose of loading the ship with passenger baggage. It was owned by defendant and used only by defendant for servicing its ships at Pier 92."

This Court in *Huff v. Matson Navigation Co.,* 338 F.2d 205 (C.A. 9th Cir. 1964) held that the fact that an unloading device was furnished by the stevedore did not change the shipowner's duty to furnish seaworthy equipment for unloading purposes.

> "Under all of these Supreme Court decisions it is plain that the fact that the stevedoring company brought this unloading device to or into the ship in no manner lessens the shipowner's absolute obligation of seaworthiness which extends to the loading or unloading equipment furnished by the stevedoring company." (P. 212.)

This Court's decision was followed in the third and fifth circuits in the cited cases of *Spann v. Lauritzen,* 344 F.2d 204 (C.A. 3rd Cir. 1965) and *Deffes v. Federal Barge Lines, Inc.,* 361 F.2d 422 (C.A. 5th Cir. 1956). In all of these cases, however, the courts have made quite clear that the warranty of seaworthiness involves the vessel's hull, gear, and stowage and also its appurtenant appliances and equipment, but they do not extend the warranty further. The cases have also made clear that the shipowner is not relieved of this obligation because the defective equipment was owned and operated by the stevedore rather than by the shipowner and was only temporarily used aboard the vessel.

The remaining case cited by appellant in this section of Appellant's Opening Brief *(Gutierrez v. Waterman Steamship Corp.,* 273 U.S. 206, 85 S.Ct. 1185, 10 L.Ed.2d 297 (1963)) involved injuries suffered by a longshoreman on the dock as a result of cargo spilled during discharge of the ship because of defective cargo containers which were held to create an unseaworthy condition. The Supreme Court pointed out that liability may exist where the *impact* of the unseaworthy condition is felt on shore but that the question of unseaworthiness relates to the vessel itself.

> "These cases all reveal a proper application of the seaworthiness doctrine, which is in essence that things about a ship, whether the hull, the decks, the machinery, the tools furnished, the stowage, or the cargo containers, must be reasonably fit for the purpose for which they are to be used." 10 L.Ed.2d 303.

The Court in the *Gutierrez* case also bases its conclusion upon other cases where the impact of the unseaworthy condition aboard the vessel was felt upon shore, as where longshoremen on the dock were injured when cargo fell upon them because of the ship's defective cable or winch.

Strika v. Netherlands Ministry of Traffic, 185 F.2d 555 (C.A. 2nd Cir. 1950);

Hagans v. Farrell Lines, Inc., 237 F.2d 477 (C.A. 3rd Cir. 1956).

We submit that the authorities cited by appellant do not sustain his position, and they most certainly do not sustain the general proposition that a vessel may be unseaworthy because of a dangerous condition on a dock or ashore some distance from the vessel.

d. Access to the Vessel.

Appellant devotes pages 24 through 26 of his opening brief to the proposition that a vessel may be unseaworthy because of failure to provide a safe means of access to and egress from the vessel. This proposition may be taken as correct where it is limited to the area of immediate access to the vessel by way of the vessel's gangway or ladder, regardless of whether the particular gangway or ladder is furnished by the vessel or is a substitute provided for the purpose. The cases cited by appellant are all gangway or ladder cases and are clearly limited to the duty to provide a means of passage between the vessel and the dock to which it is moored. *(Buch v. United States,* 122 F. Supp. 25 (D.C. S.D. N.Y. 1954) and *Pederson v.*

United States, 224 F.2d 212 (C.A. 2nd Cir. 1955) (incorrectly titled and cited at p. 25 of Appellant's Opening Brief) are both ladder cases, while *Bradshow v. The Carol Ann,* 163 F.Supp. 366, 1958 A.M.C. 962 (D.C., S.D. Texas, 1956) (also incorrectly cited at p. 25 of Appellant's Opening Brief) involved the use of an intervening vessel as a gangway between the vessel and the dock.) The cited cases are certainly not authority for the position urged by appellant that a dangerous or defective condition several hundred feet away from the vessel along a dock or ashore will render the vessel unseaworthy.

e. In the Service of the Ship.

Appellant makes a final contention (pp. 26-30 of Appellant's Opening Brief) that appellant was on "the business of the ship" at the time of his accident. This is wholly incorrect, since (as noted previously) appellant was going ashore on leave for purposes of his own and was not engaged in any ship's business. It is quite true (as held in the first of the cases cited by appellant) that appellant under such circumstances would have been in the course of his employment for purposes of maintenance and cure *(Aguilar v. Standard Oil Co.,* 318 U.S. 724, 63 S.Ct. 930, 87 L.Ed. 1107 (1943)), but this has no bearing on the issue of unseaworthiness.

The second case cited by appellant *(Marceau v. Great Lakes Transit Co.,* 146 F.2d 416 (C.A. 2nd Cir.) (1945)) was a Jones Act case in which recovery was allowed to a seaman returning from shore leave who was injured on the dock immediately ad-

jacent to the foot of the vessel's gangway. Appellant in his discussion of the case, however, fails to point out that the dangerous condition on the dock had been created through the negligence of the vessel in sweeping debris from the vessel on to the dock and placing the vessel's gangway in that area without providing proper light.

The third case cited by appellant to sustain his contention *(Braen v. Pfeifer Oil Transport Co.,* 361 U.S. 129, 80 S.Ct. 247, 4 L.Ed.2d 191 (1959)) was also a Jones Act case, and recovery was permitted where the seaman was working on a barge being used as a gangway between his vessel and the dock. Counsel states (p. 29 of Appellant's Opening Brief) that the case "is dispositive of this question". We submit, however, that it is not only "dispositive", but is wholly irrelevant to counsel's apparent proposition that a seaman proceeding along a dock on shore leave is "on the business of the ship" and hence entitled to recover upon the ground of unseaworthiness of the ship because of a defect or dangerous condition of the dock far removed from the vessel.

It seems quite clear that the cited authorities relating to maintenance and cure and to negligence under the Jones Act simply have no bearing on the proposition urged by appellant.

f. Conclusion.

We again submit that the doctrine of unseaworthiness is related to unseaworthiness of the vessel itself and that there is no basis in law or in fact for appellant's contention that the hole in the dock far re-

moved from the vessel could in any way render the vessel itself unseaworthy. Under almost identical circumstances where a seaman was injured on a trestle while returning from shore leave the Court in *Dangovich v. Isthmian Lines, Inc.,* 218 F.Supp. 235 (D.C. S.D. N.Y. 1963), stated:

> "Plaintiff's action is versed in both negligence and unseaworthiness. No evidence has been advanced by the plaintiff that in any way could be interpreted as proving the defendant's vessel was unseaworthy." (P. 236.)

And the Court in *D'Costa v. U. S. Lines Co.,* 227 F. Supp. 180 (D.C. S.D. N.Y. 1964) where a seaman was injured on a city street while returning from shore leave stated:

> "On these facts there is no possible basis for a claim that the vessel was unseaworthy." (P. 181.)

It is submitted that the Court below was correct in granting appellee's motion for dismissal of the third cause of action of appellant's complaint, since the alleged dangerous condition of the dock or ashore far from the vessel's gangway could in no conceivable way render the vessel itself unseaworthy.

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3. THERE WERE NO ERRORS IN THE TRIAL COURT'S INSTRUCTIONS WHICH WOULD JUSTIFY A REVERSAL OF THE JURY'S DEFENSE VERDICT

a. Appellant's Contentions.

Appellant charges errors in the Court's instructions to the jury with respect to the first cause of action of the complaint (which charged negligence for failure to provide appellant with a safe and proper means of

access to and egress from the vessel). Appellant charges that the Court erred in modifying three of appellant's proposed instructions (Nos. 2, 6 and 28) and in refusing to give two of appellant's proposed instructions (Nos. 24 and 17).

Appellee submits that the Court did not err, either in modifying or in refusing the instructions in question, and appellee further submits that even if there were any error in the instructions it would not be grounds for reversal, since appellant was not entitled to have the issues under the first cause of action submitted to the jury, since appellee was entitled to summary judgment or a directed verdict as to this cause of action.

b. The Trial Court Committed No Error in Modifying Appellant's Proposed Instructions Nos. 2, 6 and 28.

Appellant has set out in Appellant's Opening Brief (pp. 30-36) the three instructions as to which error is claimed by reason of the Court's modifying the proposed instructions by striking portions thereof. It is quite apparent with respect to all three of the instructions that the material stricken by the Court was entirely redundant and repetitious, and consequently was both unnecessary and improper.

We do not believe that it requires any citation of authorities to support the proposition that a court's instructions to a jury are the court's own and are to be couched in the court's own language. Such instructions need not be stated in the precise language required by counsel, provided that the instructions when considered as a whole are full and correct. It is also

quite clear the Court need not give repetitious instructions which would give undue emphasis to any particular issue on theory. A reading of the Court's instructions as given in the present case and a reading of the repetitious language which was stricken makes it apparent that the Court fully instructed the jury under appellant's theory of the case.

Counsel argues that a party is entitled under Rule 51 of the Federal Rules of Civil Procedure to instructions on every theory of the case having substantial support in the evidence. While a party may be entitled to have a theory stated, he is certainly not entitled to have it repeated and reiterated as if it were contained in a Tibetan prayer-wheel or a cracked phonograph record.

c. The Trial Court Properly Refused to Give Appellant's Proposed Instructions Nos. 24 and 17.

Appellant has set forth in his opening brief (pp. 37-40) the two refused instructions in question. A simple reading of these instructions makes it quite clear that they are wholly improper and that the trial Court did not err in refusing to give them.

Appellant's proposed Instruction No. 24 is both argumentative and incorrect as a statement of law. It is argumentative in the multiple references in its first paragraph to issues outside of the evidence and in its statement in the second paragraph as to reasons for the alleged rule of law. Basically, however, it is improper as a wholly incorrect statement of the law in its reference to a "higher degree of care". The gravamen of a Jones Act case is negligence and the

standard of care is that which is reasonable under the circumstances. A minimal quantum of proof may be sufficient to uphold a finding of negligence under the Jones Act, but this would not justify the proposed instruction.

The concept of "negligence" under the Jones Act is discussed at length in *Vickers v. Tumey,* 290 F. 2d 426 (C.A., 5th Cir., 1961), and has been repeatedly stated by this Court in such cases as:

> *DeZon v. American President Lines,* 129 F.2d 404 (C.C.A. 9th Cir., 1942); aff'd 318 U.S. 660, 63 S.Ct. 814, 87 L.Ed. 1065 (1943);
>
> *Sundberg v. Washington Fish and Oyster Co.,* 138 F.2d 801 (C.C.A., 9th Cir., 1943);
>
> *American Pacific Whaling Co. v. Kristensen,* 93 F.2d 17 (C.C.A., 9th Cir., 1937).

The authorities cited by appellant's counsel in support of the proposed instruction would not in any way support the legal position urged. *Armit v. Loveland* and *The State of Maryland* relate only to the quantum of proof required to sustain a finding of negligence; *The H. A. Scandret, Krey v. U.S.,* and *Storgard v. France & Canada S.S. Corp.* are all concerned with unseaworthiness rather than negligence; and the Supreme Court in *Braen v. Pfeifer Oil Transp. Co.* was concerned with the question of "course of employment" rather than the standard of care. No authority has been cited which would justify the proposed instruction.

Appellant's proposed Instruction No. 17 is so grossly argumentative and improper as to require

little discussion here. The first three lines would seem to be proper.

> "In determining the question of shipowners negligence under the Jones Act, you may consider all the factors and circumstances in the case.",

but the balance is wholly and totally improper as an instruction to a jury. It sets out in an entirely argumentative fashion some but by no means all of the alleged factors and circumstances which the jury might consider. We respectfully submit that the giving of such an instruction would constitute gross error which would most certainly have justified the setting aside of a favorable verdict for appellant had the jury brought in such a verdict.

We are at a loss to understand the relevance of counsel's argument at pages 40-42 of Appellant's Opening Brief to the effect that "operating negligence" may create an unseaworthy condition aboard a vessel. This may or may not be a correct statement of the law, but since the first cause of action is based upon negligence under the Jones Act, we fail to see the applicability of counsel's argument. It might or might not be relevant to a proposed instruction on unseaworthiness, but it can hardly constitute authority that an argumentative and prolix proposed instruction on negligence is proper.

d. The Issues Under the First Cause of Action Should Not Have Been Submitted to the Jury.

Assuming arguendo that the Court erred in modifying or refusing the instructions discussed above, appellee respectfully submits that any such error

would not be a ground for reversal herein, since appellant was not entitled to have any issue under the first cause of action submitted to the jury.

The first cause of action of the complaint charges negligence with respect to the alleged dangerous condition of the dock and appellee's failure to inspect and warn appellant of the danger. The evidence was undisputed that the dock was not owned or controlled by appellee (being owned and controlled by the Mexican government) and that appellant was going on shore leave at the time of his injury. The authorities are clear that under such circumstances a shipowner has no duty to provide a seaman on shore leave a safe means of ingress or egress from the vessel beyond the gangway, and consequently the shipowner is not liable to a seaman on shore leave for unsafe conditions in places beyond the gangway not under the shipowner's control if the unsafe condition has not been created by the shipowner.

Todahl v. Sudden & Christenson, 5 F.2d 462 (C.C.A. 9th, 1925) 1925 A.M.C. 849;

Aguilar v. Standard Oil Co., 318 U.S. 724, 87 L.Ed. 1107 (1943 A.M.C. 451);

Lemon v. U.S., 68 Fed. Supp. 793, 1946 A.M.C. 1640 (D.C. Md. 1946);

Farrell v. U.S., 167 F.2d 781 (C.A. 2nd Cir., 1948); aff'd 336 U.S. 511, 93 L.Ed. 850 (1949);

Wheeler v. West India S.S. Co., 103 F. Supp. 631, 1952 A.M.C. 148 (D.C. S.D. N.Y.) (1951); aff'd per curiam, 205 F.2d 354 (C.A. 2nd Cir.); cert. denied 346 U.S. 889, 98 L.Ed. 393 (1953);

Paul v. U.S., 205 F.2d 38, 1953 A.M.C. 1000 (C.A. 3rd Cir.);

Thurmau v. Alcoa S.S. Co., Inc., 1955 A.M.C. 1056 (D.C. S.D. N.Y. 1955); aff'd 229 F.2d 73, 1956 A.M.C. 323 (C.A. 2nd Cir);

Dangovich v. Isthmian Lines, Inc., 218 F. Supp. 235 (D.C. S.D. N.Y. 1963); aff'd 327 F.2d 355 (C.A. 2nd Cir., 1964);

Martinez v. S.S. Hawaiian Retailer, 1963 A.M.C. 1188 (D.C. S.D. Ga., 1963);

Trost v. American Hawaiian S.S. Co., 324 F.2d 225 (C.A. 2nd Cir., 1963) cert. denied 376 U.S. 963, 11 L.Ed. 981 (1964);

D'Costa v. U.S. Lines Co., 227 F. Supp. 180 (D.C. S.D. N.Y., 1964).

Of the cases cited above *Todahl, Aguilar, Farrell, Wheeler, Hall, Dangovich* and *Martinez* involved injuries on a dock or wharf, while the other cases involved other areas away from the vessel.

It is further clear from the authorities that the shipowner has no duty to a seaman going on shore leave to inspect and warn of possible dangerous conditions in a shore area beyond the shipowner's control.

Farrell v. U.S., supra;

Wheeler v. West India S.S. Co., supra;

Paul v. U.S., supra;

Dangovich v. Isthmian Lines, Inc., supra;

Trost v. American Hawaiian S.S. Co., supra.

Where the facts are undisputed (as here) the question becomes one of law rather than one of fact to go to the jury. On this basis summary judgment for

defendant was granted in the *Martinez* and *D'Costa* cases, judgment on the pleading (on demurrer or exceptions) for defendant was granted in the *Todahl* and *Lemon* cases, judgment for defendant notwithstanding a verdict for plaintiff was granted in the *Wheeler* case, and judgment for plaintiff was reversed in the *Trost* case.

Appellee submits that under the above line of authorities appellee was entitled to have the issues under the first cause of action withdrawn from the jury's consideration, either by way of summary judgment or by a directed verdict for appellee as to that cause of action. Since appellant was not entitled to have these issues considered by the jury, appellant is in no position to complain as to any possible error in the trial Court's instructions in submitting this cause of action to the jury.

IV.

CONCLUSION

Appellee submits that appellant has demonstrated no error in the judgment of the Court below which would be grounds for reversal of that judgment.

The Court's judgment of dismissal on the pleadings as to the third cause of action was properly granted as there was no issue of fact to go to the jury on the question of whether the vessel could have been rendered unseaworthy because of a condition existing on a dock or ashore far removed from the vessel.

There were no errors in the Court's instructions which could possibly justify a reversal of the judg-

ment entered on the jury's defense verdict on the first cause of action. The jury was fully instructed in accordance with appellant's theory of the law and appellant has no basis for criticism of the instructions. Appellee further submits that appellant was not entitled to have the issues under the first cause of action submitted to the jury, since appellee was entitled to summary judgment of dismissal as regards this cause of action.

It is respectfully submitted that the judgment should be affirmed.

Dated, San Francisco, California,
October 15, 1967.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of the within Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the within Brief is in full compliance with those Rules.

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